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October 18, 1993

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C.

Dear Mr. Caton:

Transmitted herewith, on behalf of EZ Communications, Inc., the applicant in MM Docket Number 93-88 for renewal of the license of radio station WBZZ(FM), in Pittsburgh, Pennsylvania, is its Reply to Memorandum of Law in that proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,


Herbert D. Miller, Jr.

enc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**OCT 18 1993**

Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

EZ Communications, Inc.For Renewal of the License of FM Radio Station
WBZZ (FM) on Channel 229B at Pittsburgh,
Pennsylvania**Allegheny Communications Group, Inc.**For a Construction Permit for a New FM Broadcast
Station on Channel 229B at Pittsburgh, PennsylvaniaMM Docket Number
93-88To: Honorable Edward Luton
Administrative Law Judge**REPLY TO MEMORANDUM OF LAW**

EZ Communications, Inc., (EZ), the applicant for renewal of the license of radio station WBZZ(FM), in Pittsburgh, Pennsylvania, files herewith, by its attorneys, its Reply to the Memorandum of Law submitted by Allegheny Communications Group, Inc. (Allegheny).

The question presented at the admission session on Wednesday, October 13th was whether evidence of acts **not** amounting to violation of any Commission rule or policy can be considered negatively in evaluating a licensee's renewal expectancy. Allegheny makes no attempt to answer that question, and instead argues that its Exhibits 3 and 4 for identification demonstrate rule or policy violations.

Before considering Allegheny's arguments, it is important to review carefully what it seeks to admit into evidence. Both the arbitration proceeding and the subsequent appeal of the arbitration decision to the U.S. District Court

involved an action between the American Federation of Television and Radio Artists (AFTRA)--the WBZZ announcers' union--and the licensee.

Allegheny Exhibit 3 is a written decision by a Pittsburgh Arbitrator whose sole function was to determine whether Elizabeth Randolph, WBZZ's former News Director, was entitled to monetary severance benefits normally due under the station's AFTRA contract, despite the fact that she left her job in the middle of an air shift. The precise issue was whether Ms. Randolph was justified in abruptly leaving her shift or should have stayed and filed a job grievance. Allegheny Exhibit 3, p. 9.

The narrow holding of the arbitrator was that Ms. Randolph's actions were "justifiable," that the circumstances of her leaving constituted "...a narrow exception to the self-help rule..." and that Ms. Randolph should "...receive payment for all severance benefits to which she is entitled together with interest at the rate of 6% per annum from February 5, 1988." (Allegheny Exhibit 3, Pages 13-15.)

Allegheny Exhibit 4 for identification is the opinion of the U.S. District Court for the Western District of Pennsylvania upholding the Randolph arbitration award. As the court noted:

"In keeping with well established principles of federal labor law, the arbitrator's award must be sustained so long as it 'draws its essence from the collective bargaining agreement.' *Graphic Arts International Union v. Haddon Craftsmen*, 796 F.2d 692, 694 (3d Cir. 1986).

"The arbitrator interpreted the relevant portions of the collective bargaining agreement as an agreement by the employer to pay announcers severance pay unless the employee is guilty of 'flagrant neglect of duty, drunkenness, dishonesty or other serious cause.'" (Allegheny Exhibit 4, p. 4).

The sole basis for the District Court's decision upholding the Randolph award was that:

"While EZ Communications argues that the arbitrator exceeded his authority in issuing the award, we find that plaintiff is in fact seeking a review of the merits of the award which was based on a reasonable interpretation of the contract. Id at 36. The arbitrator properly interpreted the contract and applied that interpretation to the facts presented. If we were to second guess his reasonable construction, we would exceed our authority and scope of review." (Allegheny Exhibit 4 for identification, p. 6).

While the arbitration decision describes the "POSITION OF THE EMPLOYER" (Allegheny Exhibit 3 for identification, p. 9) and the "POSITION OF THE UNION" (*Id.*, p. 11), to the extent that it goes beyond the narrow issue at hand, it is simply the view of one individual about conduct which was clearly identified in any event as being restricted to "on the air" "banter" which was "...[f]ortunately or unfortunately (depending on one's perspective)..." due First Amendment protection. There was no finding of any kind by the Arbitrator or the District Court that WBZZ had violated any state or federal law or Federal Communications Commission rule or policy.

The answer to the question posed at the admission session, as provided by the Commission in 1986 statement of *Policy Regarding Character Qualifications in Broadcast Licensing* (102 FCC 2d, 1179) is "No." There, the Commission stated that facts tending to degrade an applicant's "character," but which could not lead to disqualification, "would no longer be a relevant criterion in comparative renewal proceedings," (102 FCC 2d at 1232), with the sole exception that

"Our action today in no way prejudices consideration of compliance with the Communications Act and/or the Commission's rules and policies as it may relate to an incumbent's past broadcast record in the context of acquiring a legitimate renewal expectancy. For example, violations of the Communications [Act] or a **specific**

Commission rule or policy may militate against the finding of a meritorious record" 102 FCC 2d at 1232, fn 125 (internal citation omitted) (emphasis added).

In *GAF Broadcasting Company, Inc.*, FCC 93-4191, released August 16, 1993, the Commission cited the above language and stated:

"To the extent that there may be ambiguity about our policy, we wish to emphasize that in comparative renewal proceedings, allegations involving a licensee's **violation** of the Act, rules or policies can be relevant in the determination of the weight to be given to a licensee's claim to renewal expectancy." *Id.*, at ¶20. (emphasis added)

Accordingly, the Commission stated:

"From the above, it would appear that alleged **violations** of the Commission's EEO rules, for example, **if they raise a prima facie question about compliance with the rules**, might be pertinent to the ALJ's determination of GAF's entitlement to a renewal expectancy, even if no qualifying EEO issue were designated against GAF." *Id.*, at ¶21 (emphasis added).

The Commission in *GAF*, *supra* held that **actual** rule violations established on a prima facie basis -- even rule violations insufficiently serious to warrant disqualification -- can be considered in evaluating a claim to renewal expectancy. It did **not** hold that unfounded allegations of rule violation, explicitly rejected in the *Order* designating the case for hearing, may be so considered.

The *Hearing Designation Order* in this proceeding (DA 93-361) considered and rejected as unfounded all of Allegheny's allegations of rule and policy violation. These involved news distortion (*HDO*, ¶ 6), indecency (*HDO*, ¶ 9), civil misrepresentation (*HDO*, ¶13), abuse of process (*HDO*, ¶15) and discrimination (*HDO*, ¶ 11). As to the latter, the Commission stated:

"A sex discrimination issue will not be specified. Section 73.2080 is designed to prevent discrimination by licensees on the basis of race, color, religion, national origin or sex in the recruiting, hiring and promoting of employees. Allegheny has not demonstrated **any**

discrimination in recruiting, hiring or promoting of employees by EZ." (*HDO*, ¶ 11) (emphasis added).

In finding that Allegheny had not demonstrated **any** discrimination, the Commission had before it all of the materials now offered by Allegheny as Exhibits 3 and 4, and more, as well as all of Allegheny's arguments (see Allegheny June 28, 1991 Petition to Deny). That finding precluded the specification of a discrimination issue. It **also** precludes the consideration of those same materials in evaluating EZ's claim to a renewal expectancy, for the simple reason that they have been found to contain no evidence pertinent to discrimination or to anything else cognizable by the Commission.¹

Allegheny's memorandum of law presents no precedent for the thesis that evidence of acts **not** amounting to violation of any Commission Rule or policy can be considered negatively in evaluating a licensee's renewal expectancy.

¹ Allegheny sought certification of the *HDO*'s finding that WBZZ had committed no EEO rule violations, and certification was denied (FCC 93M-218, released May 3, 1993). Allegheny then filed an unauthorized Application for Review of the *HDO* on May 10, 1993, which remains pending at the Commission. Among other things, the Allegheny Petition challenges the construction of Section 73.2080 of the Rules relied upon in the *HDO* (Allegheny petition, pp. 2 -4). Allegheny, at the admission session on October 13th, reiterated its challenge to that construction, and does so again in its Memorandum. If the Commission considers Allegheny's petition on the merits, it will presumably resolve the legal dispute between Allegheny and the authors of the *HDO*. We do not address that matter here, beyond noting the consistency of the *HDO* with the *Report and Order* amending the EEO rules, 2 FCC Rcd 3967 (1987), viz,

"In deciding to include specific EEO requirements in our broadcast rules, it is our intention not to alter the broadcasters' current EEO obligations, and particularly to avoid areas not directly related to the employment practices of the station. . . . Our concern in the matter of broadcast EEO policy is directed primarily at a broadcast licensee's efforts and practices in recruiting, hiring, and promoting within its own station(s)." (2 FCC Rcd at 3969).

Allegheny instead argues that the conduct related in its exhibits 3 and 4 for identification contravened Commission policy. It offers only one citation in support of that thesis, *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925 (Rev. Bd. 1991) *aff'd* 8 FCC Rcd 4520 (1993), and it is inapposite. There, an applicant for an FM construction permit had represented in response to a question in FCC Form 301 that no adverse finding had been made that "related to employee discrimination." Contrary to that representation, there had been a judicial determination that there had been a violation of "New Jersey Law Against Discrimination" involving sexual harassment. The individual who had made the representation on the FCC Form 301 (the holder of all of the voting stock of the applicant) had been the very person who had committed the offense in question (6 FCC Rcd at 925) by making unwelcome sexual overtures to a female employee and firing her when she refused them (*Id.* at 926). At hearing, he denied that he had been a defendant in the suit and made other false statements as well (*Id.* at 926).

There are numerous differences between the situation in *Atlantic City Community Broadcasting, Inc.*, *supra*, and that presented here. The most important of them is that *Atlantic City Broadcasting, Inc.*, *supra* involved discrimination. Judge Kuhlmann noted in his *Initial Decision* that

"The Commission has long had rules that prohibit broadcast stations from discriminating against female employees. . . . Thus, his illegal conduct under New Jersey law was also conduct specifically prohibited by the Commission and it was conduct which he personally engaged in. Mr. Hayes' ultimate fall back position was that he thought that the only discrimination that the Commission cared about was race discrimination. There is overwhelming evidence he knew that that was not the truth." (quoted at 6 FCC Rcd 925, 926)

The situation presented by Allegheny Exhibits 3 and 4, on the other hand, involves no violation of law and, as specifically found in the *HDO*, no discrimination whatever.² The Commission has never promulgated a rule, or announced a policy³, prohibiting a radio station from broadcasting allegedly offensive and risque jokes in poor taste, not amounting to indecency or obscenity⁴, at the expense of the station's on-air personnel. The lawfulness under the Constitution of any such rule or policy would be highly questionable. So, obviously, would consideration of such protected speech in deciding whether to grant a license renewal application.

Allegheny also argues that its Exhibits 3 and 4 for identification should be received as rebuttal to EZ's Exhibits 3 and 4 (Allegheny Memorandum, pp. 4 - 5), and states that "The Presiding Judge may not allow EZ to present affirmative evidence while arbitrarily preventing Allegheny from presenting evidence on the same matter." (*Ibid.*) But Allegheny is mixing apples and compost. EZ's EEO exhibits relate directly to the Commission's EEO rules and policies. Allegheny Exhibits 3 and 4 for identification have nothing to do with those rules and policies, or with EZ's performance with respect to them, as the *HDO* found. They are no more relevant than would be exhibits purporting to demonstrate that some WBZZ employees are unhappy or work in unpleasant conditions generally .

Consideration of the matters alluded to in Allegheny Exhibits 3 and 4 for identification would produce the very situation the Commission's *Policy Statement*

² There is no indication in Allegheny Exhibits 3 and 4 for identification that anyone at WBZZ ever made unwelcome sexual overtures to Ms. Randolph, or that she was terminated for declining them.

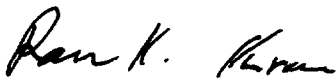
³ Much less a "specific" rule or policy, see 102 FCC 2d at 1232, fn. 125.

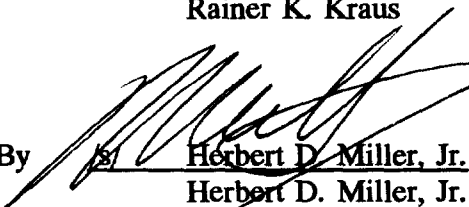
⁴ The *HDO* also rejected Allegheny's allegations of indecency and obscenity.

on *Character Qualification in Broadcast Licensing* sought to avoid, the inter-minable consideration of "an incredible range of non-FCC behavior," to little purpose. (102 FCC 2d at 1194)⁵. It would provide nothing whatever on the basis of which to predict the nature of EZ's future performance as the licensee of WBZZ. Allegheny has shown no justification for the receipt in evidence of its Exhibits 3 and 4 for identification, and they should be rejected.

Respectfully submitted,

EZ Communications, Inc.

By  /s/ Rainer K. Kraus
Rainer K. Kraus

By  /s/ Herbert D. Miller, Jr.
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October 18, 1993

⁵ Allegheny contends that EZ would be collaterally estopped to respond with offers of evidence should its exhibits 3 and 4 for identification be received (Allegheny Memorandum, p. 8). Even assuming *arguendo* (and, we believe, incorrectly) that EZ could not collaterally attack either of those proposed exhibits, it could certainly offer evidence to shed further light on their subject matter and on the impact, if any, which they should properly have on its renewal expectancy.

Certificate of Service

I, Richard Massie, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by hand:

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October 18, 1993